VIRGINIA LAW REGISTER.

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THE B. F. Johnson Publishing Company, of Richmond, announce the early publication of a new and enlarged edition of Judge Simonton's work on the Organization, Jurisdiction and Procedure of the Federal Courts, with an appendix on Bankruptcy Jurisdiction and Procedure. The first edition of Judge Simonton's work proved extremely popular, and we are not surprised to find a new edition called for.

WE have some interesting papers in hand for publication, most of which have been in our possession for several months. We beg that contributors will not become impatient, or imagine that they are being slighted. We endeavor to exercise a judicial discretion in determining the order in which contributions are to be published. The maxim of *prior in tempore* is given due weight, but other considerations must of necessity be taken into account.

Among the articles on hand is a valuable one entitled "The Extension of Loans Secured by Deed of Trust," to which there is no signature. The letter accompanying it has been carefully filed away, but we have forgotten the author's name, and without it a search of the files is impracticable. He will confer a double kindness by declaring his identity and pardoning our forgetfulness.

COMPARATIVELY little interest has been indicated in the question of the construction of the married woman's statute, to which considerable attention was devoted in our last issue, and upon which we requested a general expression of opinion from the bar of the State. Up to the present time, we have received ten letters on the subject—seven of the writers concurring in the views expressed by the REGISTER, and three opposed. One of the latter considered the question as settled in *Duval* v. *Chelf*, 92 Va. 489, and that further argument was useless; another, a distinguished circuit judge, had decided the question

in a case before him, several years ago, against the wife's general power to contract; and the third, while impressed with inconsistency of its provisions, thought the statute too plainly written to argue against it. Of the seven on the other side, one was a recent convert from the opposing view, and two others were professionally interested in maintaining the adverse view.

None of the communications were written for publication, so we publish none. No arguments were offered for the opposing view. Those advanced on the side of the REGISTER were, in the main, along the same lines as previous arguments in the REGISTER.

We shall be glad to receive studious papers on the subject for publication—whether long or short.

THE effort made in New York to suppress the sale of prison-made goods in the interest of free labor, is meeting with difficulties in the courts. In *People* v. *Hawkins*, 51 N. E. 257, the constitutionality of recent legislation on the subject, came before the New York Court of Appeals. The plaintiff was indicted for selling a scrubbing brush, made by prison labor in Cleveland, Ohio, without labelling the same "convict-made," as required by the New York statute. The statute was passed under a constitutional amendment, which was adopted after great opposition, and with a blare of trumpets. It turns out, as construed by O'Brien, J., that the amendment merely abolishes the "contract system" of labor in prisons, and does not prohibit, or authorize the legislature to prohibit, or hamper, the sale of prison-made articles not produced under the "contract system." O'Brien, J., held therefore that such legislation was unconstitutional as depriving the citizen of property without due process of law; and that it could not be upheld under the police power, since the fact that the goods are prison-made does not in any way concern the life, limbs, health, morals or property rights of the people. As is well said by the learned judge, if the police power extends to the protection of certain workmen against competition of other workmen in penal institutions, why not extend it to other forms of competition? Why not give the workman with a large family, some advantage over him who has no family at all—or to the old and feeble over the young and vigorous—to women, as the weaker sex, over the men? Whatever be the character of labor performed by the convict, he takes the place of some free laborer, and to that extent competes with the latter. But the statute does not protect all free labor. Its protection is confined to those engaged in

manufactures only, and is thus subject to condemnation as class legislation.

It was further held that the article in question having been produced in another State, any attempt to hamper its sale in New York was an interference with interstate commerce. Gray, Martin and Vann, JJ., concurred in the opinion, so far as it declared the statute an unwarranted interference with interstate commerce.

Bartlett, J., delivered a dissenting opinion, concurred in by Parker and Haight, JJ. The argument of Judge Bartlett against the construction that the statute interfered with interstate commerce, is especially unsound. "If," says he, "dealing in prison-made goods is against public policy, and is prohibited by the Constitution, the legislature may regulate the dealing in such goods, and provide for the criminal punishment of those who violate the act. Such statute would be in harmony, and not in conflict, with the Constitution. If against public policy, then it would be within the police powers of the State, and not in conflict with the provisions of the Constitution of the United States investing Congress with power to regulate commerce among the several States, to legislate as to the sale of foreign convict-made goods. *Plumley* v. *Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154; and cases before cited."

If such reasoning be sound, then any State may regulate whatever business or transaction is against its own public policy, and all interstate commerce becomes subject to State regulation and control, and the interstate commerce clause of the Federal Constitution becomes a dead letter. In every one of the multitude of cases in which State statutes have been declared unconstitutional because of their interference with interstate commerce, such statutes were passed in furtherance of the public policy of the State. Public policy in the States has exacted license taxes of non-resident drummers and of foreign transportation companies, has laid burdens of various kinds on goods imported from other States, and undertaken in many ways to regulate commerce with other States, but State policy has not served to save such legislation from the just and repeated condemnation of the United States Supreme Court.

In an editorial note to the case of *Liberty Savings Bank* v. *Otter View Land Company*, in our November number (p. 458), we discussed the question whether, under Virginia Code, section 2920, a contract implied by law from a written instrument was a "contract by writ-

ing," and therefore subject to the limitation of five years, or not a contract in writing, and therefore barred in three years. Our conclusion was that such a contract *is* "by writing," and subject to the five-year period of limitation.

Since then, the identical question has been decided by the Supreme Court of Nebraska, in *Connor* v. *Becker*, 76 N. E. 891 (October 20, 1898). The Nebraska statute, like our own, prescribes one period of limitation for contracts in writing, and a shorter period for those not in writing. The case was an action by the holder of a dishonored check against the drawer. The defendant pleaded that the action was barred within the shorter period, since the promise to pay upon dishonor was not in writing, but merely implied by law.

The court held that where the promise is one conclusively implied by law from the writing, like the contract of the drawer or endorser of a check or bill, so that the suit is maintainable on the writing itself, the contract is to be regarded as written. In such case, the production of the writing alone establishes the plaintiff's case.

The court properly distinguishes the case of *Platt* v. *Black*, 10 Ohio Circ. Ct. R. 499. In that case the defendant drew a check on the plaintiff bank, which the bank paid, though there were no funds on deposit to meet it, and the suit was by the bank to recover the amount. Here the court applied the elementary principle that the drawee who pays a check or bill can maintain no action on the instrument itself; and the action being one for money laid out and expended, right of recovery must be established by evidence *aliunde*—the mere production of the cancelled check not being sufficient proof. In the hands of the bank on which it is drawn, a check does not import a loan or an advancement by the bank, but a payment out of funds on deposit. 2 Daniel Neg. Instr. 1647. Hence the court ruled that the promise to repay to the bank the sum advanced was not a written one. The decision was proper, and not in conflict with the ruling in *Platt* v. *Black* (*supra*) that the promise of the drawer to the payee *is* a written promise.

We publish in full elsewhere in the present issue, the opinion of the Virginia Court of Appeals in *Foster* v. *Commonwealth*, where the court holds, in accordance with the weight of authority, that an infant under the age of fourteen is conclusively presumed incapable of committing rape, and therefore cannot be convicted of the attempt.

Comparing this decision with that in *Law* v. *Commonwealth*, 75 Va.

885, quoted with apparent approval in the *Foster Case*, there is a curious inconsistency in the law of this subject in Virginia. In the earlier case, the court declined to decide, as not involved in the case, whether such a presumption of incapacity prevails or not, but held that an infant under fourteen, who had assisted an older boy in attempting to commit the crime, might be convicted as principal in the second degree, and punished as principal in the first degree—if sufficient discretion were proved.

Putting the two decisions side by side, the curious result follows, that an infant may be principal in the second degree, and be punishable as principal in the first degree, for a crime which he cannot commit. Or, more correctly, if an infant under fourteen himself commits an assault with intent to rape, his incapacity protects him; but if he assists another in making the attempt, his infancy does not protect him. It is not unlikely that the later case will be construed as overturning the former.

In *Commonwealth* v. *Green*, 2 Pick. 380, it is held that while an infant under fourteen cannot be convicted of rape, he may be convicted of the attempt—on the ground that the infant's exemption from conviction for the rape itself does not rest on any presumption of incapacity, but upon the unwillingness of the law to punish him for so serious an offence.

We publish elsewhere, amongst "Notes of Cases," some account of a recent decision by the Supreme Court of New Hampshire (*State* v. *Jackman*, 41 Atl. 347), declaring invalid a city ordinance, adopted under legislative authority, making it the duty of abutting lot owners to clear snow from the sidewalk in front of their premises. In the few cases we have been able to find on the subject there is a conflict of opinion.

Other cases maintaining the view of the New Hampshire court are *Gridley* v. *Bloomington*, 88 Ill. 554 (30 Am. Rep. 566), and *Chicago* v. *O'Brien*, 111 Ill. 532 (53 Am. Rep. 640).

The leading case upholding such an ordinance is *Re Goddard*, 16 Pick. (Mass.) 504 (28 Am. Dec. 259), in which Chief Justice Shaw spoke for the court, in a characteristically vigorous opinion. This case is followed in *Village of Carthage* v. *Frederick*, 122 N. Y. 268 (19 Am. St. Rep. 490), and has the approval of Judge Dillon: 1 Dillon Munic. Corp. (4th ed.), 394.

These authorities justify such legislation as a proper exercise of the

police power. In the case last cited, Vann, J., speaking for the New York court, thus presents the inconvenience of the opposing view:

"In this latitude, the accumulation of snow upon sidewalks in large quantities, is a matter of course. Its presence retards travel, interrupts business, and interferes with the safety and convenience of all classes. It is a frequent cause of accidents, and thus affects the property of every person who is liable to assessment to pay the damages caused by a failure to remove it. But how is it possible for the authorities of a large city, with many hundred miles of streets, to remove the snow in time to prevent injury to those who have the right to travel upon the sidewalks, unless they can require the owners and occupants of adjacent property to remove it? Every man can conveniently and promptly attend to that which is in front of his own door, and it is both reasonable and necessary that he should be compelled to do so."

The latter view certainly has the merits of convenience. But by the same argument an ordinance requiring the abutter to clear the snow from the middle of the street as well, would be equally valid and still more convenient; and so with an ordinance requiring him to sweep and sprinkle the street in summer; or to light it at night; or to remove obstructions therein caused by the act of strangers.

Howsoever convenient the rule, it seems to lay a burden on the abutter, for an object in which he has no more interest than other citizens, and which does not add to the value of his property, as in the case of special assessments for permanently improving the street. Even in the case of local assessments, it seems to be an established principle that the assessment cannot be made a personal obligation of the abutter, but a charge only on the lot itself. To make it a personal debt is unequal taxation. *Asberry* v. *Roanoke*, 91 Va. 562, citing Cooley on Taxation, 471, 472; Burroughs on Taxation, 475. The same case maintains the doctrine that such assessment can only be upheld on the ground of benefits received. "Strike out the element of benefits received, and a special assessment loses its foundation." See also *Violett* v. *Alexandria*, 92 Va. 561.

If no special benefit accrues to the lot owner from the performance of such a duty, or if it be made a personal obligation, as it usually is, instead of a charge upon the lot, an ordinance of this character would seem to be invalid in Virginia, according to the constitutional views announced by the Virginia court in the cases cited.

But when the question arises in this State it is to be sincerely hoped that the court may succeed in finding some ground for maintaining the validity of the ordinance, because of the very great inconvenience that would otherwise result.